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716-036—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 578

JOSEPH D'ERCOLE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 641

JOHN CIMINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 578, App. C; R. II,[1] 63b) is reported at 321 F. 2d 509.

[1] The record, comprising the appendices in the court below, is in two volumes, to which we refer as "R. I" and "R. II." "R. III" refers to the original record, which includes the transcript of the trial.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1963 (Pet. No. 578, App. A; R. II, 82b). Petitions for rehearing were denied on September 24, 1963 (Pet. No. 578, App. B; R. II, 99b–109b). The petition for a writ of certiorari in No. 578 was filed on October 23, 1963. On October 16, 1963, Mr. Justice Harlan extended the time for the filing of a petition for a writ of certiorari in No. 641 to and including November 23, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions must be reversed because the government did not produce an informant as a witness, when the record indicates that petitioner D'Ercole did not request that the government produce the informant until after conviction and that the government diligently sought to locate the informant at the request of petitioner Cimino.

2. Whether, in a non-jury trial, the court's examination of a report reciting petitioners' criminal convictions, submitted only for *in camera* inspection with regard to one petitioner's request for its production pursuant to the Jencks statute, constituted prejudicial error.

STATEMENT

After a trial before the court in the United States District Court for the Southern District of New York, petitioners were convicted of two substantive viola-

tions and a conspiracy to violate the narcotic laws. 21 U.S.C. 173, 174 (R. II, 7b, 21b). Each was sentenced as a third offender to twenty years' imprisonment on each count, the terms to run concurrently (R. III, 953, 954). On appeal the judgments were affirmed, Circuit Judge Waterman dissenting as to petitioner D'Ercole.

a. *The evidence.*—The government's evidence, developed through the testimony of federal narcotics agents, was as follows:

A federal narcotics agent, Avant, was introduced to petitioner Cimino by Scott, a special employee of the Bureau of Narcotics, on the morning of November 10, 1960, in Brooklyn, New York. As the three men proceeded in Avant's automobile to Manhattan, Avant began negotiations with Cimino for the purchase of a quarter kilo of heroin. Cimino indicated that he could get the narcotics and that he could not give a price but felt that it would be in the range of $3,600 to $4,200. He said that he must contact his source "Joe Z" (R. I, 9a–12a).

When the three men arrived at 117th Street and Second Avenue at approximately 12:30 p.m., Cimino alighted from the car and instructed Avant and Scott to meet him at Benny's Luncheonette at 116th Street and Third Avenue (R. I, 12a). Surveilling agents saw Cimino walk east on 116th Street to a point near Pleasant Avenue where he met petitioner D'Ercole and engaged in a conversation. When petitioners parted, a half hour later, Cimino walked back west in the direction of First Avenue; D'Ercole shortly there-

after entered Gus' Restaurant nearby (R. I, 33a, 58a–59a).

Cimino rejoined Avant and Scott at approximately 1:30 p.m. in Benny's Luncheonette. Cimino told Avant the delivery of the quarter kilo of heroin would take place at 7:30 p.m. and that the price would be $3,800. He stated that if Avant would agree to the price he would call "Joe Z" to make the necessary arrangements. When Avant so agreed, Cimino walked to a telephone booth, dialed the number LE 4–9197 and had a conversation (R. I, 12a–13a). At approximately this same time, an agent, having D'Ercole under surveillance, observed that D'Ercole entered a phone booth in Gus' Restaurant where he remained for a few minutes. The telephone number in the booth used by D'Ercole was LE 4–9197 (R. I, 59a–60a).

When Cimino completed his call, he requested that Avant drive him to the Eden Roc Bar at 123rd Street and Seventh Avenue. Before alighting with Scott, Cimino told Avant to meet him at this bar at 7 p.m. when he would collect the $3,800 and deliver it to "Joe Z" who would be waiting at a bakery on First Avenue (R. I, 13a). At 7 p.m., Agent Avant returned to Eden Roc Bar where he met Cimino and Scott. Cimino asked Avant to drive him to 117th Street between First and Second Avenues. There he asked for and received the $3,800 from Avant, and asked Scott to join him while he went to talk to "Joe Z" (R. I, 13a–14a). A surveilling agent saw Cimino and Scott enter Marconi's Bakery nearby, meet D'Ercole, and engage in a conversation (R. I, 34a–

35a). When the three emerged from the bakery, D'Ercole walked to 115th Street where he approached a group of men standing on the sidewalk. An agent overheard one of the men who left the group to talk with D'Ercole say to D'Ercole "I have another deal. Your deal will have to wait until nine-thirty" (R. I, 55a–56a).

Cimino and Scott, upon leaving the bakery, returned to Avant's car. Cimino said that "there was heat" in the area and that the delivery had been postponed until 9:30 (R. I, 14a). Thereupon Cimino, Scott, and Avant returned to the Eden Roc Bar where Cimino stated that all he was receiving from the transaction was $250 (R. I, 14a).

During the evening upon two other occasions, Cimino, Scott, and Avant returned to the vicinity of 117th Street (R. I, 14a, 17a, 18a). Upon one occasion Cimino and Scott were seen to leave Avant's car, enter a drug store, and converse with D'Ercole (R. I, 35a–36a). Upon the other occasion Cimino left Avant's car to enter a Cadillac which drove off immediately. He returned to meet Scott and Avant in the latter's car at Benny's Luncheonette at approximately 11:30 p.m., and delivered the heroin to Avant shortly thereafter (R. I, 19a).

Agent Avant met Cimino and Scott again on the afternoon of November 22, 1960. Avant represented that he wanted another quarter kilo of heroin but that he only had $3,600. He asked if Cimino could arrange the purchase and permit him to make up the difference on future sales. Cimino said that he believed that it would be all right but that he would

talk to "Joe Z." The three men proceeded to Benny's Luncheonette where Cimino entered a phone booth and again dialed the number LE 4-9197 (R. I. 21a).

After the call, Cimino told Avant and Scott that he was going to meet "Joe Z" at a luncheonette on First Avenue. Avant drove Cimino to 118th Street near First Avenue. Cimino asked for and received the $3,600, and alighted from the car after instructing Avant and Scott to return to the Eden Roc Bar where he would join them later (R. I, 21a–22a). Surveilling agents saw Cimino walk to 116th Street and First Avenue, enter a luncheonette, meet D'Ercole, and remain with him for about fifteen minutes (R. I, 42a–43a). When Cimino rejoined Scott and Avant, he said that delivery would take place at the Eden Roc at about 8:30 p.m. (R. I, 23a).

Twice during the evening Avant drove Cimino back to the 118th Street location (R. I, 24a). On the first of these occasions Cimino was seen to leave the car and to meet and converse with D'Ercole (R. I, 44a). Thereafter he told Avant that delivery had been postponed until 10 p.m. (R. I, 24a). Cimino did in fact deliver the heroin to Avant at 10:30 at the Eden Roc. He told Avant that he would make arrangements for him to meet "Joe Z" upon his next purchase (R. I, 25a).

At 12 p.m. on December 7, 1960, Agent Avant again met Cimino at Benny's Luncheonette. Avant represented that he was interested in purchasing another quarter kilo of heroin and asked if Cimino could make the necessary arrangements. When Cimino indicated

that he could, Avant asked if he could meet "Joe Z." Cimino said he would talk to "Joe Z" about that and he suggested that Avant call him (Cimino) at the LE 4-9197 number at 3 p.m. (R. 1, 25a-26a).

At 3 p.m. Agent Avant called LE 4-9197. Cimino's voice answered. Avant told Cimino that the price for a quarter kilo was a little too high and asked if he could make other arrangements. Cimino answered that the best price Avant could get was $3,800. Avant then asked to speak to "Joe Z." There was a pause and Avant heard another voice say "Hello." Avant asked to whom he was speaking and the voice answered "This is Joe Z." It continued, "Give Johnny the money as you have done previously on your other two purchases. Everything will be all right. The quality and the quantity of the stuff will be the same. * * * Later on we can meet and have dinner and discuss the price on future purchases." Cimino's voice then came back on the phone and asked Avant to meet him at a luncheonette on First Avenue (R. 1, 26a-31a).

At the time this conversation was taking place, agents had under surveillance Gus' Restaurant, the location of the Lehigh phone number. Shortly before 3 p.m., they saw Cimino and D'Ercole enter the restaurant and walk toward the telephone booths in the rear. At 3 p.m. Cimino went into the phone booth, then exited, and D'Ercole entered. D'Ercole came out and Cimino reentered. Thereafter both men left the restaurant together (R. 1, 48a).

b. *The inquiries as to the informant.*—At trial on November 14, 1962, counsel for Cimino, on cross-

examination of the government's first witness, Agent Avant, elicited that the name of the special employee was "Sol" ("Saul") and that "Saul" had been introduced to Agent Avant by Agent Costa (R. III, 126, 141). Two days later, Cimino's counsel, in cross-examining Agent Costa, elicited that the special employee's full name was "Saul Scott" and that his last known address (in early September 1962) was the Manhattan Towers Hotel (R. III, 307–308). At this time counsel inquired "Isn't Saul Scott also known as Saul Sapp?" and Costa indicated that this was correct (R. III, 308). Thereafter on redirect Costa was asked by government counsel what efforts he had made since September to locate Scott. Counsel for D'Ercole objected stating (R. III, 358):

> What materiality does it have, Your Honor, if efforts were made to locate Saul Scott? We are not making an issue that he is not here.

The court overruled the objection after counsel for Cimino indicated that he was going to ask the court to direct that the government produce Saul Scott (R. III, 359).

Agent Costa testified that he had since September tried unsuccessfully to reach Scott at the hotel and in various "uptown" places frequented by Scott in the past (R. III, 360). He testified, over defense objection, that he had sought to communicate with Scott up until the present time at the request of the Assistant United States Attorney "in case the defense wanted him as a witness at the trial" (R. III, 363). The court suggested that government counsel make a statement as to the availability of Scott, and counsel

for D'Ercole objected, noting, "I made no demand upon the United States Attorney for the production of Saul Scott" (R. III, 364–365). Pursuing the matter on cross-examination of Costa and two other agents (R. III, 369–375, 401–403, 411), counsel for Cimino repeated his demands that the government produce Scott (R. III, 390, 420). The court, assuring D'Ercole that any representation of fact by government counsel would not be binding upon him, asked government counsel if he knew the whereabouts of Scott. The Assistant United States Attorney replied (R. III, 428):

> I have no information—well, I won't say I have no information as to where he is; I heard rumors—purely hearsay—from agents, including Agent Costa. I have no idea where he is, Your Honor. I never saw the man in my life.

The court stated that, since the witness was not under the government's control, it would not direct that the government produce him but it told the Assistant United States Attorney that the government should help the defense by giving such "reasonable assistance" as it could in producing the witness (R. III, 430). The Assistant United States Attorney indicated that the government would so cooperate. Counsel for Cimino indicated satisfaction with this assurance and the trial recessed for the week end (R. III, 430, 432).

Thereafter the court on every day of the trial heard the statements of counsel and the sworn testimony of the government agents as to what efforts had been made to locate Saul Scott. On Monday,

November 19 (at a time when the government had rested), counsel for Cimino reported that over the week end he had knocked on the door of Room 405 of the Manhattan Towers Hotel and received no answer to his knock or to a message he had left (R. III, 438–439). He produced the manager of the hotel who testified that Scott, since checking into the hotel, had changed his name to "S. Fields," that the man had not checked out, but had paid his account for the last week and had been seen two weeks before in the lobby (R. III, 446–449). Agent Costa next testified that on Friday night, November 16, he had checked at hotel room 405 upon three occasions and found no one there—that he had never known Scott to use the name Fields given by the desk and that therefore he did not leave messages. He spent three hours checking Harlem bars—the Eden Roc, Count Basie's, Small's Paradise, the Shalimar—places which Scott had frequented. He explained that his experience as a narcotics agent had taught him never to make personal inquiries of persons in the bars but that he called back to the various places to ask if "Saul" were around and to leave a message that he call "Dave" at home (R. III, 468–475, 472). After Agent Avant also testified as to having searched unsuccessfully for Scott in the Harlem area over the weekend (R. III, 481–482), counsel for Cimino requested a further continuance to see if the government through "extensive efforts" could bring in the missing man. The court granted a continuance until the following morning, requesting the government to

use "reasonably best efforts" to find Scott (R. II, 487, 489).

On the following day, November 20, 1962, Cimino's counsel again reported on a fruitless visit to the hotel room the night before. Agent Costa told of a search beginning at 12:30 the previous afternoon and extending through most of the afternoon and evening—between five and six hours (R. III, 547–549). Agent Avant told of a search beginning at 5:30 the previous afternoon (R. III, 565–567). At this point Cimino's counsel asked Avant if he had tried to contact anyone in Philadelphia. Avant replied that he had not—that he did not know anyone there (R. III, 569).

On this day, Tuesday, November 20, Cimino completed his defense subject to reopening upon any new developments regarding Scott (R. III, 625). At the conclusion of rebuttal testimony offered by the government, the court referred to its previous holding that the witness Saul Scott was not under the control of the government and that it would not direct the government to produce him. It observed that, nevertheless, in order that both sides be given ample opportunity to locate the witness, it would grant a continuance until 2 p.m. on Friday, November 23, 1962, and it directed the government to use "its best efforts" to locate and produce Scott (R. III, 677–678).

On November 23, 1962, at the appointed time for trial, counsel again told of repeated fruitless visits and telephone calls to the hotel (R. III, 684–686).

Agents Costa and Avant testified as to their investigative activity in the vicinity of the hotel and the Harlem bars on Tuesday night, Wednesday, Thanksgiving day, and Friday morning (R. III, 687–691). The court denied Cimino's renewed motion for a mistrial[2] on the grounds that the government had failed to produce a vital witness (R. III, 692–700). The court found that the witness was not under the control of the government, that the government was under no obligation to bring him in, and that the government had taken reasonable steps to locate the witness (R. III, 699). All parties then rested.[3]

On November 26, 1962, the court found both petitioners guilty (R. III, 758–759).

On the day of sentence, December 4, 1962, Cimino's counsel indicated that he was not ready for sentence because he must have the testimony of Saul Scott. He said that on the afternoon of December 2, 1962, he received information by telephone that Saul Scott was at Manhattan Towers Hotel. He placed a call to Room 405 and a man answered. Cimino's counsel identified himself and asked if the man were "Saul." The party answered that he was "Irving Pittman" who had been authorized to pick up personal belongings of Scott, but in the conversation that followed about Scott, " kept slipping in and out of the fic-

[2] See also R. III, 441, 624.

[3] On final argument, counsel for D'Ercole argued *inter alia* that, while he had not been pressing for presence of Saul Scott, there was a right to infer, from the failure of the government to locate him, that if he were to take the witness stand, his testimony would be hostile to the government (R. III, 733–735).

tion—speaking at times as "I" and again as "My friend Saul." Counsel expressed his desire (and that of counsel for D'Ercole) to meet the party. The man promised to call counsel at 9 that night and gave his own telephone number as KI 5-9813, his home as Pennsylvania and his business address as 2002 Reed Street, Lehigh, Pennsylvania, information which counsel tried unsuccessfully to verify by telephone immediately after the conversation. Counsel next called counsel for D'Ercole to tell him of the conversation and awaited the 9 o'clock call. The call came at 12:30 a.m. and lasted some fifteen minutes. At this time the man told counsel that Saul Scott would testify. He said that his testimony might harm Cimino because he knew Cimino's relationship with women. He said that "the other man" (D'Ercole) was innocent. Counsel prevailed upon the man to come forward to testify, to call counsel for D'Ercole, and to call him again at 5 o'clock the following day. No further calls came (R. I, 77a-83a).

Counsel for D'Ercole confirmed that Cimino's counsel had called him to notify him that he might be receiving a telephone call but the call never came. He asked for a continuance "so that we may make further efforts to locate this man and then apply to your Honor to reopen the trial and permit us to elicit the testimony of this man * * * whether it be favorable to the defendant or unfavorable to him" (R. I, 83a-84a).

At the conclusion of this account by counsel, the court indicated that under these "unusual and diffi-

cult" circumstances, it was "not prepared * * * to leave any stone unturned" to obtain the testimony of Scott (R. III, 790). It indicated that sentence would be postponed for one week and it directed the government to cooperate fully with the counsel for the defendants in a "full scale effort" to locate the witness (R. III, 791–792). It instructed that the witness, if found, was to be served with a subpoena by the government as well as the defense. The Assistant United States Attorney indicated that the government would cooperate to the fullest extent and he suggested that the court direct that the government take Scott into custody as a material witness (R. III, 792–793). On this and the following day, at the request of the government, warrants of arrest were issued for Saul Scott and Irving Pittman (R. III, 805, 806).

One week later, on December 11, 1962, the narcotics agents were resworn and gave a day-by-day, hour-by-hour report of their unsuccessful attempts to locate Saul Scott (R. III, 807–831). They related contacts made with other agencies—the Philadelphia office of the Bureau of Narcotics, the New York offices of the Bureau of Customs and the United States Coast Guard in an attempt to locate him; the New York Telephone Company in an attempt to trace the telephone number KI 5-9813. They reported further surveillance of the Harlem area following reports that Saul Scott had been seen there and the results of an interview with hotel personnel. They described their investigation of reports that Scott had left for Arizona including interviews with airline employees.

At this time Cimino's counsel reported that he had gone to the Manhattan Towers hotel on December 4, together with members of Cimino's family. This was just after Cimino's sister, who would have been able to identify Scott, had reported to counsel that she had called Room 405 and that a man had answered. The management permitted the group to enter the room; they found a coat on the floor but no one there. The room had since been locked by the hotel for nonpayment of bills. Subsequent calls had been to no avail (R. III, 800–802).

Cimino's sister took the stand to testify that, on December 4 at about 11 a.m. she had left the courtroom quietly to place the telephone call after she heard Scott's name and the Manhattan Towers mentioned. She said that she had in fact called twice, at 10:45 and 11:45, disguising her voice—"I knew him very well." After Scott hung up the last time she ran to get counsel and they hurried to the hotel to find that Scott was no longer there. Upon questioning by government counsel, Cimino's sister testified that she had seen Scott once and that upon one occasion he had brought a birthday gift to her husband. She told of numerous occasions during the years 1961 and 1962 when Scott had called her house to ask for Cimino. The last such time he had called had been in June 1962 (R. III, 837–841).

At the conclusion of the testimony, counsel for Cimino expressed appreciation for the efforts made to contact Saul Scott. Assuming that this was all that could be done, he nevertheless renewed his motion

for a mistrial, arguing that Scott's testimony was urgent (R. III, 842). Both counsel asked for an indefinite continuance.

The court denied both the motion for mistrial and that for a continuance. It observed that, in its view, the government had made all reasonable efforts to locate Saul Scott, that the defendants must have been aware of his identity and that it was strange that the last telephone contact with Scott had not been brought to the attention of the court or the United States Attorney—a procedure which might have ensured Scott's apprehension. It stated that it did not feel justified in further postponing proceedings and that the defendants had a remedy under Rule 33 of the Federal Rules of Criminal Procedure[1] (R. III, 852–855).

ARGUMENT

1. Petitioners recognize that *Roviaro* v. *United States*, 353 U.S. 53, requires no more than that the government reveal the identity of an informant, in response to a demand by the accused, in circumstances where the testimony of the informant is material to the defense. They also apparently recognize that there is no general requirement that the government produce any particular witness. *Williams* v. *United States*, 273 F. 2d 781, 796 (C.A. 9), certiorari denied, 362 U.S. 951; *Eberhart* v. *United States*, 262 F. 2d 421, 422 (C.A. 9); *Washington* v. *United States*, 275 F. 2d 687, 690 (C.A. 5); 2 Wigmore (3rd ed. 1940) § 290,

[1] Rule 33 provides that a motion for a new trial on the basis of newly discovered evidence may be made within two years of final judgment.

p. 176. See *Masciale* v. *United States*, 356 U.S. 386, 388, note 4. Petitioners urge (Pet. No. 578, p. 17; Pet. No. 641, p. 4) that the rule of *Roviaro* should be extended "in the limited fashion of requiring the Government to produce an informer at trial where the informer was within the Government's control" and where his testimony could "tip the scales in favor of guilt or innocence." The facts of this case, however, do not present an occasion for an examination of that issue.

As to petitioner D'Ercole, evidence of guilt was established through the testimony of agents which placed him in the telephone booth to which Agent Avant was connected during a conversation with a person who identified himself as the "Joe Z" who had supplied Avant with narcotics. The agents' testimony also established a consistent pattern of meetings between D'Ercole and Cimino taking place immediately after Cimino had represented to Agent Avant that he was going to see "Joe Z," or just prior to the time Cimino either delivered narcotics or advised Agent Avant as to arrangements. While the testimony did show that on at least two of these occasions (on November 10th) special employee Scott was present at the meetings between Cimino and D'Ercole, this fact did not require the government to present Scott as a witness. See *Masciale* v. *United States*, *supra*; *Washington* v. *United States*, *supra*.

In any event, D'Ercole, prior to his conviction, did not request—indeed, he actively opposed—that the government produce Scott as a witness. He therefore cannot now contend that Scott's unavailability preju-

diced him in any way. Nor can he claim, as the dissenting judge stated below, that it must be presumed that Scott's testimony would have been unfavorable to the government since the government failed to produce him. For the government did not object to having Scott testify; instead it vigorously attempted to locate him. In contrast, D'Ercole objected to his production. Therefore, as to D'Ercole, if there is to be a presumption, it must be that Scott's testimony would have been favorable to the government.

It can hardly be suggested that any testimony from Scott could have "tip[ped] the scales in favor of guilt or innocence" of petitioner Cimino, as to whom there was no dissent below. The testimony of Agent Avant, corroborated by the testimony of surveilling agents, unequivocally established that Cimino delivered the heroin. See the Statement, *supra*, pp. 5, 6. Moreover the record shows that Scott was as available to Cimino as he was to the government. Cimino's sister testified that Scott was known to Cimino and had been in contact with Cimino's family frequently during the years 1961 and 1962 until only a few months before the trial. The inquiries of Cimino's counsel at trial indicate that counsel was familiar with the alias of Scott and knew of the connection he had with Philadelphia before this was suggested by subsequent events.

The record gives no basis for concluding that the witness was under the control of the government at a time when he was being sought. The witness had never been interviewed or even seen by the Assist-

ant United States Attorney. The agents had had no contact with him since early September of 1962. The facts recited by the agents as to their efforts to locate the witness revealed the diligence with which the witness was sought. These facts justified the finding of the district court that the witness was not under the control of the government and that the government had made all reasonable efforts to locate him (R. III, 699). The district court which had granted repeated continuances did not abuse its discretion in denying a further one. See *Smith* v. *United States*, 273 F. 2d 462 (C.A. 10), certiorari denied, 363 U.S. 846.

2. Petitioner Cimino demanded the report of Agent Costa under 18 U.S.C. 3500. This was a narrative statement of facts contained in memorandum reports, including information obtained by the witness from other officers (R. I, 48a). The government, anticipating a jury trial, had marked in blue the materials it thought should be excised (R. I, 49a).

When the question of production of the statements of the witness was raised, government counsel said that, since there were certain matters which were not producible, the report must be examined first by the trial court (R. I, 39a). Counsel for petitioner D'Ercole noted that, in determining what part of the report might be producible, the court might see inadmissible material (R. I, 39a). The court pointed out that it had to sit in a dual capacity and that no matter what the report said, that "doesn't affect

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The judge had previously read other reports without objection (R. I, 40a).

my judgment on this case in any manner, shape or form" (R. I, 40a). It pointed out that, unless the court were able to distinguish between what is in evidence and what is not, the practice of non-jury trials in criminal cases might as well be eliminated (R. I, 40a–41a, 53a, 62a). Consequently, the court examined the report and excluded certain portions before turning it over to petitioners (R. I, 50a). The judge denied a motion for a mistrial made by both defendants on the ground that the report contained material that reflected on the character and past history of the defendants (R. I, 53a). The court said that the material would have been grounds for a mistrial had it been called to the attention of a jury. He went on to say that he did not consider the material in the report to be evidence or part of the record and that "the Court will determine this case solely on the evidence before it and on no other basis" (R. I, 53a).

The motion for a mistrial was properly overruled. The trial court followed the procedure provided in Section 3500 for determining whether statements of a government witness were producible. See *Palermo* v. *United States*, 360 U.S. 343. While this resulted in the court's obtaining information which could not have been introduced in evidence, the court said that it would not consider this information. This court has held that our system presumes that a jury will follow instructions to disregard a confession by a co-defendant. *Delli Paoli* v. *United States*, 352 U.S. 232. *A fortiori*, a

judge can be trusted to disregard matters which he recognizes cannot be considered as evidence.[6]

Petitioner D'Ercole argues (Pet. No. 578, p. 11) that there was no need for the trial judge to obtain information concerning petitioners' criminal records, which possibly prejudiced his judgment, since either another judge or the prosecutor and defense counsel together could have decided what materials were producible. These proposals, however, are contrary to Section 3500, which provides that the trial court is to decide this issue. Moreover, it is not feasible for another judge (assuming one is available) who is unfamiliar with the facts of the case, to decide whether a statement "contains matter which does not relate to the subject matter of the testimony of the witness" (18 U.S.C. 3500(c)) in the context of a going trial. Certainly, the government need not show defense counsel reports in order to determine whether they are producible in whole or part since it would defeat the design of Section 3500 "to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States*, *supra*, 360 U.S. at 354. If the prosecutor thought the matter could legitimately be turned over to defense counsel, there would be no need to get a judicial ruling at all.

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[6] Petitioner D'Ercole's reliance (Pet. No. 578, p. 12), on *Benton* v. *United States*, 233 F. 2d 491 (C.A. 4), is misplaced. There, the trial judge, sitting without a jury, considered as evidence of intent the defendant's prior conviction. Here, the trial judge explicitly did not consider the defendants' record as evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1963.